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In the
Supreme Court of the United States

October Term, 1946

No. 733

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, a corporation,

Petitioner,

VERSUS

FEDERAL POWER COMMISSION, LOUISIANA PUBLIC SERVICE COMMISSION, CITY OF NEW ORLEANS, LOUISIANA, and CITY OF BATON ROUGE, LOUISIANA,

Respondents.

MOTION OF STATE OF OKLAHOMA FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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JANUARY, 1947.

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MOTION OF STATE OF OKLAHOMA FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The State of Oklahoma requests that it be granted permission to file the attached brief *amicus curiae* in support of petition of Interstate Natural Gas Company, Incorporated, for a rehearing on the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

It is the view of the State that the decision of the Circuit Court, if allowed to stand, will vitally affect the power of the States to regulate the production of natural gas and crude oil and the conservation of oil and gas reserves, contrary to the intention of the Congress as set forth in the Natural Gas Act.

It is the further view of the State that the Circuit Court of Appeals erred in so construing the Act of Congress as can be demonstrated by certain factors which we believe have not been presented to this Court.

WHEREFORE, movant prays that an order of this Court be entered allowing the filing of the attached brief *amicus curiae*.

MAC Q. WILLIAMSON,
Attorney General of Oklahoma,
HOUSTON W. REEVES,
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Oklahoma City, Oklahoma.

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Respondents.

BRIEF OF THE STATE OF OKLAHOMA, AMICUS CURIAE, IN SUPPORT OF PETITION OF INTERSTATE NATURAL GAS COMPANY, INCORPORATED, PETITIONER, FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

STATEMENT OF ISSUES MATERIAL TO THIS BRIEF

The record shows that Interstate Natural Gas Company, Incorporated, owns gas wells and a gas gather-

ing system in the Monroe gas field in Louisiana, that it is engaged in producing, purchasing and gathering gas in that field; and that it sells and delivers a part of this gas in the Monroe field to three pipe line companies which receive the gas and transport and sell it in interstate commerce (statement by Interstate, R. II. 599-564; statement by Commission R. II. 577-581). Pursuant to a hearing, the Federal Power Commission issued its Order 91 (R. I. 55) asserting rate regulatory jurisdiction over these sales to these three pipe line companies and directing that the rates or prices for sales of gas to these pipe line companies be reduced as directed in said order. Upon appeal to the Circuit Court of Appeals of the Fifth Circuit, that court issued its opinion and order (R. II. 910-928) denying the petition of Interstate Natural Gas Company, Incorporated, for review of the said order of the Federal Power Commission.

In its said opinion, pursuant to which its said order was issued, the Circuit Court of Appeals held that the provisions of Section 1 (b) of the Natural Gas Act exempting from the provisions of the Act "the production or gathering of natural gas," do not operate to exempt from the rate regulatory jurisdiction of the Federal Power Commission prices received in the field by producers and gatherers of gas for gas sold to pipe line companies which subsequently transport and sell the gas in interstate commerce but that the said exemption applies only to the physical acts of

producing and gathering gas. In the opinion the court says:

> "We think petitioner's difficulties in construction and interpretation arise out of the fact that, treating unlike things as alike, it tries to read the exception with respect to production or gathering as an exception with respect to sales. There is no warrant in the act for so doing."

The court further held that a sale in the field at the terminal of the gathering line of a producer and gatherer of natural gas where all of the production and gathering and the sale and delivery of gas to the interstate carriers of natural gas took place within the State of Louisiana, became a sale in interstate commerce separate and apart from the production and gathering of gas and lost its character as a local activity because the purchasers subsequently transported and sold such gas in interstate commerce, even though the producer and gatherer had parted with all title, control and interest in the property, and was not interested in such gas, after the local sale and delivery.

THE INTEREST OF THE STATE

The State of Oklahoma is not interested in facts in this case which may or may not distinguish the said sales (by Interstate Natural Gas Company, Incorporated, in the Monroe Field to said three pipe line companies) from sales of gas made by other producers and gatherers generally to pipe line companies which transport and sell the gas in interstate commerce. But it is vitally interested in

the opinion of the Circuit Court of Appeals in this case as an authority or precedent to the effect that all sales of gas which is subsequently transported and sold in interstate commerce are sales in interstate commerce subject to the rate regulatory jurisdiction of the Federal Power Commission, whether or not such sales are made by producers and gatherers whose operations are limited to the production and gathering of such gas and are made at the termination of such producing and gathering operations within the state where such production and gathering took place. The State is vitally interested in having this Court review the decision of the Circuit of Appeals of the Fifth Circuit, and either reverse the decision or so limit the decision that it will not operate as a precedent or authority to the effect that all sales of gas by producers and gatherers of gas to pipe line companies which subsequently transport and sell such gas in interstate commerce are sales in interstate commerce and subject to the rate regulatory jurisdiction of the Federal Power Commission, even though made as an integral and necessary part of production and gathering of natural gas.

The production of crude oil and natural gas and the manufacture of products thereof constitute one of the most important industries of the State of Oklahoma and the conservation of crude oil and natural gas reserves and the prices received for crude oil, natural gas and products thereof are of paramount importance to the State and its citizens. Jurisdiction in the Federal Power Commission to

fix the prices received by all producers and gatherers for gas sold to pipe line companies which subsequently transport and sell the gas in interstate commerce would have a direct and substantial effect not only upon the prices received for such gas but also upon the conservation of all crude oil and natural gas reserves in the State, and the protection of the correlative rights of all owners of such crude oil and natural gas reserves, and upon the income of the State and its citizens. Just as the power to tax is the power to destroy, so the power to regulate wellhead and gathering prices is the power to control production and gathering. It is therefore of utmost importance to the State of Oklahoma and its citizens that this Court grant the writ and review the decision of the Circuit Court of Appeals.

THE CONSTRUCTION OF THE ACT

Section 1(b) of the Natural Gas Act provides:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply* to any *other transportation* or *sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." (Emphasis is ours).

Section 2 of the Act defines interstate commerce as follows:

> " 'Interstate commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."

While it may be assumed that the production and gathering of natural gas and the intrastate sales of such gas, which is subsequently transported and sold in interstate commerce, so affects interstate commerce that Congress *could* have exercised control over this part of the gas and oil industry if it had chosen to do so. It is clear that Congress *did not* see fit to exercise this power. Congress by the express provisions of the excluding language of Section 1(b) of the Act and by its definition of interstate commerce positively stated that it did not seek to regulate or control any phase of the industry other than *transportation and sale* of gas in *interstate commerce.* It further expressly stated that the Act should not apply to the "production or gathering of natural gas" or to "other sales."

Much has already been said in briefs before this Court and by the Court itself in regard to the significance of the phrase "the production or gathering of natural gas"(1) as used in Section 1(b) of the Act and, in briefs before this Court in other cases and in this case, the legislative history of the Act in respect of the use of that phrase

1. *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 88 L. ed. 333; *Colorado Interstate Gas Co.* v. *Federal Power Commission* and *Canadian River Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 89 L. ed. 1206; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 89 L. ed. 1241.

has been reviewed. We shall not in this brief undertake to extensively discuss any of the arguments that have already been made in this connection. Suffice it to say that the State concurs with the view that the phrase "production and gathering" excludes the sales made by production and gathering concerns to natural gas companies which subsequently transport and sell such gas in interstate commerce for the reason set forth in briefs already filed in this case. It is the position of the State that an additional and most compelling argument that Congress, by the exemption from the operation of the Act of "the production or gathering of natural gas," did not intend to vest in the Federal Power Commission rate regulatory jurisdiction over prices received by producers and gatherers of gas sold to pipe line companies which transport and sell the gas in interstate commerce lies in circumstances which apparently have not been pointed out either to this Court or to the Circuit Court of Appeals in this case. This brief will be primarily devoted to those circumstances.

It is a well established rule of statutory construction that whenever the words of a statute are susceptible of more than one meaning, they should not be given a construction which will result in an absurdity or impossibility[2] and it is the opinion of the State that that is precisely the result that would flow from the construction placed upon the Natural Gas Act by the Circuit Court of Appeals in this case.

2. *United States* v. *Katz*, 271 U.S. 354, 70 L. ed. 986.

In the opinion of the State, cogent evidence that Congress, by the exemption of "the production or gathering of natural gas" intended to exempt from the operation of the Act *the sales* by producers and gatherers as well as their physical operations is found in facts which have not been discussed, namely, (1) that the exemption from the operations of the Act of the physical acts of producing and gathering gas without exempting the sales of gas by producers and gatherers would deprive the producing states of the power to conserve their natural resources and to protect the correlative rights of owners of oil and gas and would produce an intolerable conflict of jurisdiction; (2) that any attempt to regulate the prices received by the various producers and gatherers would be a colossal undertaking for which Congress has apparently made no provision, and (3) that in the great majority of cases it would be practically if not utterly impossible for the Federal Power Commission to fix such prices on any standard whatever other than the whim or caprice of the Commission.[3] We shall illustrate these points briefly.

3. As we shall show in this brief, the operations of Interstate Natural Gas Company, Incorporated, involved in this case are unique in this respect, in that its gathering operations are not affected by, or a part of, the production of oil, or by-products generally.

(1) The exemption from the operation of the Act of the physical acts of producing and gathering gas without exempting the sales of gas by producers and gatherers would deprive the producing states of the power to conserve their natural resources and to protect the correlative rights of owners of oil and gas and would produce an intolerable conflict of jurisdiction.

Upon casual consideration, the decision of the Circuit Court of Appeals that Congress intended by the provisions of Section 1(b) of the Act to leave in the producing states jurisdiction over the physical operations of producers and gatherers but at the same time to vest in the Federal Power Commission rate regulatory jurisdiction over the prices received by producers and gatherers for gas sold to pipe line companies which transport and sell the gas in interstate commerce may appear to have some content but, upon more careful examination, it will be found to be a statement of an anomaly or a practical impossibility. It is a familiar maxim that he who controls the purse strings controls all.

For more than thirty years the State of Oklahoma has been engaged in the conservation of its oil and gas resources and the protection of the correlative rights of owners of these resources. By its statutes and through its only constituted regulatory authority, the Oklahoma State Corporation Commission, the State imposes many limitations and obligations upon the producers and gatherers of oil and gas for that purpose. It supervises and determines the manner of the completion of productive wells and the

plugging of dry holes and abandoned wells; it regulates the manner in which wells may be produced from more than one formation, and the manner in which formations containing salt water and other deleterious substances must be plugged off to prevent contamination of producing formations; it determines the proper spacing of wells and it requires the unitization of leases within designated spacing units; it limits or prohibits the production of wells having certain "gas-oil ratios"; and it limits the rates at which wells may be produced in various fields and parts of fields; it has recently fixed the field price of gas in the Guymon area of the Hugoton Field.

The orders of the Oklahoma State Corporation Commission for the conservation of crude oil and natural gas resources must, of course, be made in the light of the funds available to the oil and gas industry from the sale of its products. For example, an order requiring all wells producing oil and gas and having a gas-oil ratio in excess of a certain stated ratio to be limited in their production, or an order limiting the total production of gas in a certain field productive of oil and gas to a certain fixed volume, or a well spacing order limiting gas wells to one well to each square mile, or an order requiring all wells in a certain field to have an extra string of casing installed, might be reasonable enough with gas selling at ten cents per thousand cubic feet but unreasonable and confiscatory with gas selling at five cents per thousand cubic feet. The competitive

prices for crude oil and natural gas necessarily gravitate to those levels sufficient to produce for the industry funds with which to comply with such conservation orders but, obviously, rate regulatory jurisdiction in the Federal Power Commission over the prices received by producers and gatherers for gas sold to interstate pipe line companies would vest in the Federal Power Commission control over a substantial part of the funds available to producers of oil and gas for compliance with the conservation orders of the State of Oklahoma and would limit, if not destroy, the power of the State to conserve its crude oil and natural gas resources and to protect the correlative rights of owners thereof.

It may be suggested that, since the Natural Gas Act clearly leaves to the producing states control over the physical operations of the production and gathering of natural gas and denies that control to the Federal Power Commission, the Commission, as a matter of law, would, in fixing the prices of producers and gatherers of gas, have to allow them the cost of compliance with State regulatory orders. Obviously, such an argument is untenable. Any regulatory body empowered to regulate prices or rates must, of necessity, have some power to determine the reasonableness of expenditures made by the regulated company. While there might be some presumption in favor of the reasonableness of orders made under state conservation laws, there inevitably would be a point beyond which the Federal

Power Commission could challenge the reasonableness of such orders and the reasonableness of compliance therewith. Furthermore, the orders of the Federal Power Commission fixing rates or prices would necessarily be prospective in their operation and any orders by the state would be made in the face of prices already fixed. Such a conflict of authority would be confusing, and intolerable.

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(2) Any attempt to regulate the prices received by the various producers and gatherers would be a colossal undertaking for which no provision has been made.

In the State of Oklahoma alone there are thousands of wells productive of gas and there are eighty-eight natural gasoline plants. In nearby states from which gas flows into some of the same interstate channels as gas produced in Oklahoma, there are many more thousands of wells productive of gas and more than two hundred natural gasoline plants.[1] The operations of the owners of these gasoline plants are typical "gathering" operations. In a field productive of casinghead gas the gas is gathered together in a "gathering system" consisting of pipe lines converging from the wells to the natural gasoline plant and, after the extraction of natural gasoline, a part of the "residue gas" is returned to the leases through another system of field pipe lines, and residue gas over and above

1. 139 natural gasoline plants and 34 recycling plants in Texas, 27 natural gasoline plants and 4 recycling plants in Louisiana, 15 natural gasoline plants in Kansas, and 9 natural gasoline plants in New Mexico. See *Oil and Gas Journal*, April 20, 1946. For the purposes of this brief, the operation of recycling plants is substantially the same as that of natural gasoline plants as herein described.

that required for the operation of the plant and the operation of the wells is sold if a market is available, and some of this gas finds its way into interstate commerce. The respective investments, values and rates of production of all of these producers and gatherers of gas are unlike, and the conditions and circumstances under which they operate are dissimilar. Even if it were not practically impossible for the Federal Power Commission to regulate the prices received for gas by these producers and gatherers on any basis whatever other than the whim or caprice of the Commission, the task of regulating the prices received by these producers and gatherers on any individual basis would be one to stagger the imagination; and certainly would be a far greater task than Congress could have contemplated, since the desired regulation can be obtained by allowing the market value in the field in establishing the rate for regulated sales. On the other hand, their investments, values, rates of production and operating conditions, as well as the types and qualities of gas which they deliver, and the pressures and conditions under which they deliver the gas, are so dissimilar that any regulation of their prices on a group or mass basis obviously would amount to discrimination and probable confiscation.

(3) In the great majority of cases it would be utterly impossible for the Federal Power Commission to fix such prices on any standard whatever other than the whim or caprice of the Commission.

In the great majority of cases in the Mid-Continent area, the exploration for, and the development of, oil and gas resources and the production of oil and gas are so related that it would be utterly impossible for the Federal Power Commission to fix the prices received by producers and gatherers for natural gas on any standard whatever other than its whim or intuition; unless it had the jurisdiction not only to fix the prices for such natural gas but also to regulate all physical operations in the production of crude oil, natural gasoline and other products of crude oil and natural gas and to regulate the prices of those products as well. If this Court shall grant a writ of certiorari as prayed for, the State would like an opportunity to brief this matter at some length, but, for the present, a few illustrations will suffice.

One of the major services that the oil and gas industry performs for the public is the exploration for and development of new reserves. Producers in this industry must constantly search for new oil and gas reserves and must invest large sums of money in "wildcat" ventures. Necessarily many of the leases that are purchased are worthless and many of the exploratory wells are dry holes. The funds with which the industry performs this exploratory service must be derived from the sale of products by the

industry, and the level of prices for those products necessarily must be high enough to provide those funds. Obviously, any rate base standard, whether "prudent investment" or "value" be the rate base, would be wholly inadequate to provide such prices. For example, a producer who makes a discovery of crude oil and natural gas or either of them in Oklahoma must recoup from that successful venture for his exploratory failures which may have been in Texas or Arkansas. The return which he must have to maintain his business is wholly unrelated to his investment in this successful venture alone, and no "prudent investment" rate base standard as applied to natural gas produced by him in Oklahoma could possibly provide for reimbursement to him of a part of his investment in other localities on any basis other than a purely arbitrary one which necessarily must predetermine the price fixed in order to construct the rate base. The rate base standard with "value" as the rate base would be equally inadequate. As Mr. Justice Douglas has observed in the *Hope case*(1) and again in the *Canadian River case*,(2) value is the end product of the process of rate making, and not the starting point. The value of any article or thing, other than its sentimental value, is a reflection of its ability to produce revenue, and the control of the revenue necessarily includes the control of the value. This is particularly true of a gas lease the

1. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 88 L. ed. 333.
2. *Colorado Interstate Gas Co.* v. *Federal Power Commission*, and *Canadian River Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 89 L. ed. 1206.

value of which is entirely dependent upon the prices received for gas produced from the land covered by the lease. The regulation of prices received by producers and gatherers by the rate base standard with "value" as the rate base would inevitably result in reducing the value of the leases each successive time that the standard was employed.

But, in the great majority of cases, the fixing of prices received for gas by producers and gatherers would be met by an even greater obstacle. In Oklahoma as well as in the rest of the Mid-Continent area, there are far more wells productive of natural gas with oil than there are wells productive of natural gas only; and much of the gas which goes into interstate commerce is gathered and processed in the fields by gasoline plant operators whose operations have previously been described in this brief. As a rule, in the case of a producer who owns wells productive of crude oil and casinghead gas, the income from the crude oil is far greater than his income from the natural gas. In the case of the gasoline plant operator, his income from natural gasoline and other liquid hydrocarbons extracted from the gas in his gasoline plant are by no means "incidental" as they were to Panhandle Eastern Pipe Line Company[3] and in many cases the income from the natural gasoline and other liquid hydrocarbons exceeds the income from sales of "residue gas." The fact that the Commission does not have control over the physical operations of such a

3. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635, 89 L. ed. 1241.

producer or such a gasoline plant operator and does not have rate regulatory jurisdiction over the prices received for crude oil, natural gasoline and other liquid hydrocarbons would make it impossible for the Federal Power Commission to make even a bare mathematical application of any rate regulatory standard, whether "prúdent investment" or "value" be the rate base and, in fact, would make it utterly impossible for the Commission to fix the prices received by such producer and such gasoline plant operator by any rate base standard whatever other than the whim of the Commission.

Take the case of the producer. Having in mind that the level of prices in the oil and gas industry must be sufficient to support the exploration for new oil and gas reserves and that a producer must, from his "bonanza" or successful venture, recoup for his exploratory losses, it is to be expected that the "return" or revenue of this producer from crude oil alone may far exceed a rate of return on a "rate base" consisting of his productive wells and the leases on which they are located of six and one-half per cent or any other rate which the Federal Power Commission or any other rate regulatory body would consider reasonable on utility standards. Obviously the Commission could not make him give away his gas and it is equally as obvious that, if his operations in the production of crude oil and gas should result in a loss, it could not allow him a price for his gas which would give him an over-all re-

turn of six and one-half per cent on his investment. The only alternative for the application of a rate base standard would be some sort of allocation of his investment in, or cost of, his properties. The allocation would have to be either in the ratio of the volume of crude oil sold to the volume of gas sold or in the ratio of the respective incomes from these two products, but both of these ratios are subject to great fluctuation. In order to operate his leases properly, the producer must retain the right to use all of the residue gas needed for such operations. In the case of repressuring operations, this may require all of the available residue gas and leave none for sale. Consequently, the ratio between volumes of crude oil sold and the volumes of natural gas sold would fluctuate from time to time; and the ratio between the respective incomes from the two products would be subject to even greater fluctuation for the reason that the income from crude oil is the result of a fluctuating market price. It is therefore clear that it would be impossible to make even a bare mathematical application of a rate base standard to the fixing of the prices received by such a producer for his gas.

The fixing of the prices received for gas by the gasoline plant operator by rate base standards would meet precisely the same impossibility. In view of the risk involved in the investment in such a venture, it is to be expected that, in many cases, the income of the gasoline plant operator from the sale of natural gasoline and liquid hydro-

carbons alone would greatly exceed a "return" on the investment in, or value of, such operator's facilities of six and one-half per cent or any other return which the Federal Power Commission or any other rate regulatory body would consider reasonable on utility standards. Here again, the Commission could not require the operator to give away his gas and any allocation of the investment in, or value of, the properties would be equally as impossible as in the case of the producer.

The only other standards which have been suggested for use by the Commission in regulating the rates of the natural gas companies are (1) the competitive field price, and (2) the "functional test" suggested by Mr. Justice Jackson in the *Hope case* [1] and again in the *Canadian River case.* [2] It is clear that neither of these possible standards would offer any solution for the dilemma in which the Federal Power Commission would find itself in trying to regulate the prices received by the producer or the gasoline plant operator.

While the competitive field price would serve very well as a standard to gauge the allowance to be made to pipe line companies in respect of production from their own leases, it would be no standard at all by which to fix the prices received by producers and gatherers whose gas is sold to pipe line companies which transport and sell the

1. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 88 L. ed. 333.
2. *Colorado Interstate Gas Co.* v. *Federal Power Commission* and *Canadian River Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 89 L. ed. 1206.

gas in interstate commerce. This is for the reason that those producers and gatherers are, themselves, the principal competitors and the regulation of their prices would so narrow the field of competition that it would destroy the value of competitive price as a standard.

It is suggested by Mr. Justice Jackson that, by a "'functional test,'" an incentive or inducement could be offered to the producers to direct their gas into proper channels. In view of the fact that, in order to protect its tremendous investment, a pipe line company must, before construction of its line, be assured of supplies of gas by procuring purchase contracts which extend for some years, it is difficult to see how the Federal Power Commission could, through the medium of price fixing, offer any inducement to producers without approving contract prices established before the construction of the pipe line, which would be a strange procedure in the field of rate regulation. But, aside from that consideration, the suggested "functional test" would be completely inapplicable for the fixing of prices received for gas by a producer who owns wells productive of both crude oil and casinghead gas or by the owner of a gasoline plant. The producer and this gasoline plant operator are alike in one respect. They must retain a substantial measure of control over the volume of gas delivered. The requirements for gas for use as fuel in the operation of the producing properties may vary from time to time and may even consume all of the available gas. Neither can know

in advance exactly how much gas he will be able to sell to a given pipe line company at any given time. In the case of the gasoline plant operator, both the volume and the quality of the gas delivered to the pipe line company may depend, to a substantial measure, upon the extent of the extraction of liquid hydrocarbons from the gas. The extent of the extraction of liquid hydrocarbons affects materially the value of the gas to the pipe line company and, conversely, the price received by the plant operator has a direct bearing upon the volume of liquid hydrocarbons he will extract.

Gas is sold by such producers and such gasoline plant operators under a wide variety of circumstances and conditions. It may be sold at the well or it may be sold at a central delivery point. In either case, it may be sold at pressures ranging from atmosphere up to hundreds of pounds per square inch and the cost of delivery will vary with the pressure at which the gas is delivered. It may be "sweet" or it may be "sour" with widely varying sulphur content. If the gas, when produced, is sour, the seller may or may not treat it for the removal of sulphur depending upon his contract with the buyer. The value of gas for resale purposes may depend upon its heating value and the heating value of the gas delivered at different points may vary several hundred B.t.u.s per cubic foot.

The Commission clearly does not, under the Natural Gas Act, have control over the physical acts of producing

and gathering gas in the field. The Commission could not control the volumes of gas to be delivered by a producer or gasoline plant operator, the pressures at which it is delivered, the extent to which liquid hydrocarbons shall be extracted before delivery of the gas, nor the extent to which either the producer or gasoline plant operator must risk his capital in development or construction of facilities. If it had jurisdiction over the prices received by them for gas, it could consider all of these circumstances only as factors in determining the price to be paid for gas. But the value of the gas is determined by still another factor, namely, competition among the sellers. The price that a producer or gatherer can obtain for gas from a pipe line company is limited by the prices at which other producers and gatherers in the same field or in other fields are willing to sell gas to the same pipe line company. If the Commission had rate regulatory jurisdiction over the prices received by producers and gatherers for gas sold to interstate pipe line companies, it could not set the price to be paid to any particular producer or gatherer too low without forcing that producer or gatherer to use the gas in his own operations or to extract greater quantities of liquid hydrocarbons from the gas and thus reduce the quality of the gas; or to decline to risk his capital on further development or improvements while, on the other hand, it could not require the pipe line company to pay a higher price than the competitive prices at which other producers and

gatherers in the same area would be willing to sell their gas. In other words, if the Commission had rate regulatory jurisdiction over the prices received by producers and gatherers for gas sold to interstate pipe line companies, it would be bound by the same forces which fix competitive field prices and any attempt to fix such prices could be nothing more than attempt to ascertain the competitive field prices.

As a matter of fact, the only reason that it was possible for the Federal Power Commission to apply its "prudent investment" rate base standard to the operations of Interstate Natural Gas Company, Incorporated, in this case was the fact that that company had no wells in the Monroe field productive of crude oil and no gasoline plant in which it extracted natural gasoline from the gas sold by it to the three pipe line companies. The operations of Interstate Natural Gas Company, Incorporated, involved in this case were unique in this respect. It is a rare circumstance in the Mid-Continent area for the production and gathering of gas to be unaccompanied by either the production of crude oil or the operation of a recycling plant or a natural gasoline plant. As we have previously observed, there are in the Mid-Continent area far more wells productive of natural gas with oil than there are wells productive of natural gas only. In addition, in the Gulf Coast section of the Mid-Continent area there are many "distillate fields" in which the gas is gathered to a central point and processed in a "recycling plant" after

which a part or all of the gas is returned to the producing formations; and even in the cases where gas alone is produced, the gas usually contains sufficient quantities of hydrocarbons which can be removed and sold in liquid form that the operation of a gasoline plant for the removal of such hydrocarbons is usually an integral part of the production and gathering of such gas.

The foregoing discussion of the factors and conditions which must have necessarily been considered by the Congress, clearly demonstrate why the Congress was impelled to exclude the production and gathering of natural gas from the jurisdiction conferred upon the Federal Power Commission. Aside from all extraneous aids in construing the Act, it seems quite clear to the State of Oklahoma that the language employed by the Congress is not reasonably susceptible of the construction now placed thereon. Reverting to the legislative history of the enactment of the Natural Gas Act, it is found that this conclusion is supported by the reaction and statement of the persons closely connected with the drafting and passage of this legislation. In *Colorado Inter-State Gas Company* v. *Federal Power Commission*, 324 U.S. 581, Mr. Chief Justice Stone, Mr. Justice Roberts, Mr. Justice Reed, and Mr. Justice Frankfurter stated that the exemption of the production of natural gas from regulation excluded the power to fix the price of gas in the producing field. They further said:

> "The exclusion of production and gathering of natural gas from the regulatory authority of the Com-

mission is a command to the Commission not to regulate that which is excluded. Otherwise powers reserved to the state would be encroached upon contrary to the word and purpose of the Act, and a pretended government would be set up by the Commission's action, without the authority of Congress. (89 L. ed. 1232-33)."

Mr. Justice Jackson concurred in the majority opinion in said case, but stated that he would join in holding that an order of the Federal Power Commission which would have an immediate impact upon the production or gathering of gas to be beyond the jurisdiction of the Federal Power Commission. He further stated that he construed the majority opinion in which he concurred as only authorizing the Federal Power Commission to take evidence as to conditions and events quite beyond its regulatory jurisdiction where they are thought to effect the cost of that which clearly must be regulated by the Federal Power Commission. In the instant case, the Federal Power Commission has attempted to enter an order having a direct impact upon the gathering and production of gas; namely, the price which may be charged by the producer and gatherer to companies which engage in the subsequent transportation and sale in interstate commerce. It is difficult to conceive how any order of the Federal Power Commission could have a more direct impact upon any phase of the natural gas industry than the present order has upon the "gathering and production" of natural gas. Thus under the literal language of the Act as construed by five

Justices of this Court, the production and gathering of gas includes the field sales of such gas, and field sales of such gas to companies which subsequently transport and sell same in interstate commerce are not subject to the regulatory power of the Federal Power Commission.

CONCLUSION

From the foregoing discussion it should be clear (1) that an interpretation of the Natural Gas Act to mean that Congress intended to leave in the producing states control over the physical operations of the producers and gatherers and at the same time to vest in the Federal Power Commission rate regulatory jurisdiction over the prices received by producers and gatherers for gas sold to pipe line companies which transport and sell the gas in interstate commerce would, in fact, deprive the producing states of the power to conserve their oil and gas resources and to protect the correlative rights of owners thereof and would result in an intolerable conflict of jurisdiction, (2) that any attempt to regulate individually the prices received by the thousands of producers and the hundreds of natural gasoline plant operators whose gas is or may be sold to pipe line companies which transport and sell the gas in interstate commerce would be a colossal undertaking for which no adequate provision was made by Congress and any regulation of their prices on a group or mass basis would amount to discrimination and probable confiscation.

and (3) that, in the vast majority of cases, it would be utterly impossible for the Federal Power Commission to regulate the prices received by such producers and gatherers on any standard whatever other than the Commission's whim or caprice.

It cannot be assumed that Congress deliberately intended to produce an intolerable conflict between the states and a federal regulatory body or that it intended to do a vain or absurd or impossible thing. It therefore must be assumed that Congress intended that the prices received by producers and gatherers of gas should continue to be fixed in a manner consistent with our national economy, that is, by competition within the highly competitive oil and gas industry.

For the foregoing reasons, it is respectfully submitted that the petition of the Petitioner, Interstate Natural Gas Company, Incorporated, for a writ of certiorari should be granted.

THE STATE OF OKLAHOMA

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